SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(SOUTHERN DIVISION)

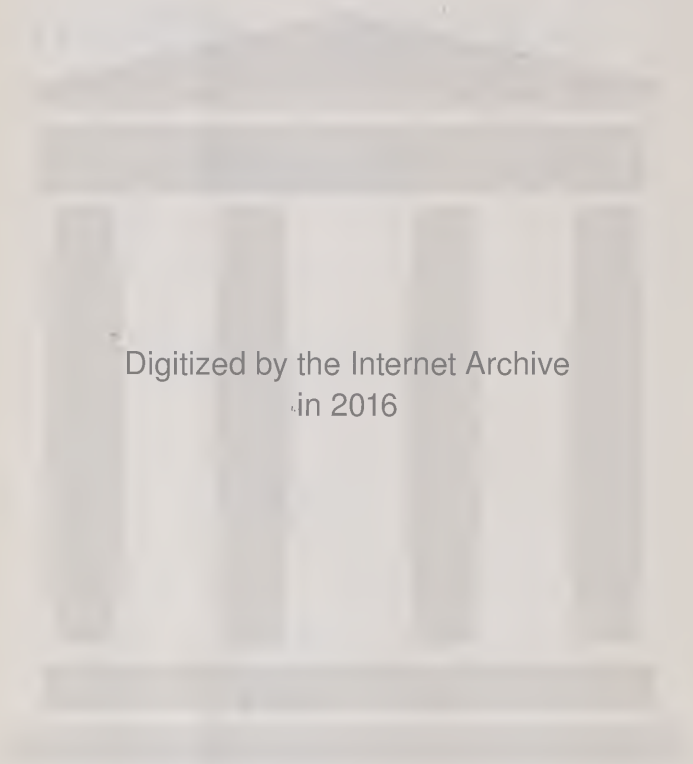
1949

Volume I

(Part VI

PRINTED IN THE UNION OF SOUTH AFRICA BY THE GOVERNMENT PRINTER, PRETORIA, 1949

G.P.-S.159—1949-50—500.



CASE No. 53.

WELCOME KOTA *v.* GERTRUDE NTSHONGA.

KINGWILLIAMSTOWN: 10th March, 1949. Before J. W. Sleigh, Esq., President, Pike and Ranwell, Members of the Court (Southern Division).

Native Appeal Case—Marriage by Christian Rites—Bigamous marriage—Claim for delivery of children—Marriage declared null and void ab initio *by competent Court—Children of marriage illegitimate and fall under custody of mother—Putative marriage—Children legitimate if one or both parents bona fide ignorant of existing marriage—Onus—Proof of ignorance.*

Appeal from the Court of the Native Commissioner, Port Elizabeth.

Sleigh (President) delivering the judgment of the Court:

Plaintiff (now respondent) was married to Harry Ntshonga in 1926. During the subsistence of this marriage she contracted a bigamous marriage with defendant (now appellant) on 24th December, 1939. In August, 1947, appellant instituted proceedings in the Native Divorce Court against respondent for a decree of divorce on the ground of adultery. Respondent pleaded that the marriage between her and appellant was unlawful as she was at the time of the marriage the lawful wife of Harry Ntshonga, who, it is common cause, died in March, 1944. On 15th March, 1948, the Native Divorce Court declared the 1939 marriage null and void *ab initio*.

Four children were born during the period the parties lived together. They are Priscilla, Robert, Myra and Phillip. Respondent alleges that another child, Joyce, was adopted by her prior to her marriage to appellant. Of these five children, Joyce, Priscilla and Robert are in the custody of appellant. Respondent now claims an order for deilvery up to her of the said three children.

Appellant denies the adoption of Joyce and that respondent, as mother, is the legal guardian of the minor children. He avers that he is the father of Joyce, but denies that Phillip is his child. He avers further that he married respondent in good faith and was ignorant of the fact that she was at the date of the marriage a married woman. In a counter-claim he prays (1) that the children Joyce, Priscilla, Robert and Myra be declared legitimate, and (2) that the custody of the said four children be awarded to him.

The Additional Native Commissioner entered judgment in favour of respondent both on the main claim and on the claim in reconvention, and the matter now comes on appeal to this Court.

In regard to the child Joyce, respondent has produced an order of adoption which clearly shows that on 28th October, 1939, she in the name of Gertrude Ntshongo adopted a non-European female child Lena Manie born on 1st January, 1937. Respondent says that Lena Els is the mother of this child, that it was born in the hospital at Port Elizabeth and that she re-named it Joyce. Appellant states that respondent gave birth to Joyce at Groot Schuur Hospital, Cape Town.

In 1938 when the adoption took place the parties were living together as man and wife and were on amicable terms. In the circumstances it is inconceivable that appellant was unaware of the adoption. We accept the evidence of respondent that Joyce is the same person as Lena Manie, and as she would not adopt her own child it follows that appellant's evidence that he and respondent are the parents of the child is false. In any case he can have no claim to its custody while the adoption order stands. In our opinion respondent's right to the child is unassailable at present.

I turn now to the three children, Priscilla, Robert and Myra, born after the marriage of the parties in 1939. This marriage has been declared by a competent Court to be null and void *ab initio*. The children born of this marriage are therefore illegitimate, and, in accordance with the general rule as to illegitimate children, they fall under the custody of their mother (*Maasdorp's Institutes of South African Law*, Vol. 1, 5th Ed., page 116).

In Bam *v.* Bhabha [1947 (4) S.A.L.R. at page 805] *Centlivers, J.A.*, said: "The Roman-Dutch authorities, which state that the children of a putative marriage are legitimate, refer to those cases where a marriage is solemnised in proper form but the marriage itself is null and void because, e.g., one of the parties was at the time already married to some one else. If in such a case one or both of the

parties entered into the marriage ceremony in bona fide ignorance of the already existing marriage, the children of the bigamous marriage were regarded as legitimate." It is contended on behalf of appellant that this is the position in the present case. It is urged that the bigamous marriage was solemnised in due form by a duly appointed marriage officer, that appellant married respondent in good faith and in ignorance of the then existing marriage between respondent and Harry Ntshonga, that the marriage contracted in 1939 was therefore a putative marriage, and that consequently the children of this marriage are legitimate. Assuming that the natural father of such children is *prima facie* entitled to their custody on the authority of Calitz *v.* Calitz (1939 A.D. 56), the only question for decision in this case is whether appellant was indeed ignorant of the existing marriage.

In this Court it is contended that the onus of proving that appellant was ignorant of the marriage was on respondent. We do not agree, but even if it were we are satisfied that she has completely discharged that onus.

Our attention has been drawn to certain discrepancies in the evidence of respondent and her witnesses. These discrepancies undoubtedly exist, but they cannot prevail against the very strong evidence that appellant was well aware of the marriage.

Respondent states that she first met appellant in 1935 at Boksburg where she lived with her husband, that appellant visited her at her home and knew her husband, that their marriage certificate was framed and hung on the wall of their home as well as a photograph of their wedding group, that she and appellant fell in love and that she ran away three times to his home in Benoni. She says that her husband fetched her back on all these occasions and once he was accompanied by William Mtanga. In October, 1936, she finally left her husband and accompanied appellant to Port Elizabeth where she lived with him as man and wife. She states that she has worn a wedding ring all the time she has known appellant, that she brought her marriage certificate with her to Port Elizabeth and that she produced that certificate to her employer in order to obtain permission for appellant, who posed as her husband, to sleep on the premises of her employer. She states further that her maiden name is "Radebe", but that when she was married to appellant he told her to inform the marriage officer that her maiden name was "Masiso", as otherwise she would be found out for committing bigamy.

Respondent's evidence is corroborated by William Mtanga and by her former employer, Miss Pohl, to whom the marriage certificate was produced.

The appellant's evidence stands alone. He denies all knowledge of respondent's former marriage. He denies that he ever visited her home in Boksburg or that he has ever seen her marriage certificate. He admits that they cohabited at intervals at his place of residence in Benoni, but says he regarded her as an unmarried girl in domestic employment. He admits bringing her to Port Elizabeth and living as man and wife with her there. He says he informed his relatives and friends on arrival that she was his wife, and that on 24th December, 1939, he and respondent were married in another district (Uitenhage) by a strange minister in his house in the presence of two strangers as witnesses. Appellant explains the apparent secrecy of their marriage by saying it was to avoid the expense of entertaining his relatives and friends. In regard to the maiden name of Masiso, appellant states that that is the only name by which he has ever known her and that all his relatives knew her also by that name only. This is a most important fact and yet appellant called none of his relatives, several of whom live in Port Elizabeth, to corroborate this statement of his.

The testimony of respondent that she always wore a wedding ring is not contradicted by appellant, nor is any explanation offered by him as to the reason why she wore such a ring prior to his marriage with her.

Appellant states further that respondent told him that her father was dead, that her mother was alive and lived at Herchel and that she had a brother whose address she did not know. He admits that he read the letters respondent received from her mother and knew the latter's address. Yet he remained silent as to whether he communicated in any way with her mother in regard to his intended marriage with respondent.

It is contended that appellant would not have sued respondent for divorce if he had known of her existing marriage but would have claimed a decree of nullity. The force of this argument is, however, considerably diminished by appellant's evidence that "as a constable I knew if I married a woman who was already

married I would also be committing a crime, being a party to a bigamous marriage". This belief of his would explain his reluctance to institute an action in which he would have to disclose respondent's bigamy.

Moreover, I cannot believe that he was ignorant of the adoption of Lena Manie *alias* Joyce. At the time of the adoption they were living together on very intimate terms and he would naturally wish to know where the child came from and why it was brought to his home. In fact it is almost certain that she consulted him before the adoption. He must therefore have been aware thereof. In the order of adoption respondent's name is given as "Gertrude Ntshongo" not "Gertrude Kota" or "Gertrude Masiso". Appellant admits he read all respondent's papers and would have asked to see the certificate of adoption and then could not have failed to notice that her surname was Ntshango (an obvious misspelling of Ntshonga). His evidence that she concealed from him the certificate of adoption cannot be accepted as they were at that time living on amicable terms.

The Additional Native Commissioner who had the advantage of all the witnesses appearing before him, was impressed with the manner in which respondent gave her evidence and accepted it, and disbelieved appellant in regard to his bona fide ignorance of respondent's first marriage. Appellant has failed to satisfy us that the Native Commissioner's conclusion on the evidence is wrong.

The appeal is dismissed with costs.

For Appellant: Mr. Stanford, Kingwilliamstown.

For Respondent: Adv. E. N. Egan, instructed by J. H. Spilkin, Port Elizabeth.

CASE No. 54.

PAULINA MADIKANE *v.* **ELIZA MASOKA.**

KINGWILLIAMSTOWN: 11th March, 1949. Before J. W. Sleigh, Esq., President, Pike and Ranwell, Members of the Court (Southern Division).

Native Appeal Case—Estate—Land in Municipal Location—Ejectment order—Site permit holder entitled to possession—Native Commissioner alone can hold enquiry—Section 23 (4) *of Act No.* 38 *of* 1927—*Enquiry confined to estates devolving according to Native Law—Practice and Procedure—Irregularity in proceedings—Native Commissioner's refusal to recuse himself or to admit record of estate enquiry not irregular where sole point is whether he has jurisdiction to grant order prayed.*

Appeal from the Court of the Native Commissioner, Queenstown.

Sleigh (President) delivering the judgment of the Court:

Plaintiff (now respondent) claims against defendant (now appellant) an order of ejectment from Stand No. 893 in the Municipal Location, Queenstown, and delivery to respondent of the said stand and the buildings and erections thereon. It is alleged in the particulars of claim that respondent is the lawful registered owner of all rights of occupation and possession of the said stand by virtue of a certificate by the Native Commissioner dated 17th June, 1948, declaring her (respondent) to be the sole heiress of the estate of the late Samuel Hlukanisa Masoka and to be entitled to have the said stand registered in her name; that the said stand has since been registered in her name by the Superintendent of the Municipal Location; and that appellant refuses to vacate the stand.

In her plea appellant resists the claim on the grounds (1) that respondent is not the lawful registered owner of all the rights of occupation and possession of the said stand, (2) that the Native Commissioner's declaration that respondent is the sole heiress of the late Samuel, is invalid because the estate enquiry was held by the Public Prosecutor of the Magistrate's Court and not by a Native Commissioner, and (3) that the Native Commissioner's certificate directing the Location Superintendent to register the stand in the name of respondent is illegal and irregular. She avers that she married the late Samuel according to Native Custom, that she purchased the stand about the year 1914, that it was registered in the joint names of herself and Samuel, and that she and Samuel lived together on it from about

1914 until the time of his death and that she is still living thereon. She claims to be the lawful owner of all rights of occupation and possession of the said stand and prays for an order directing the Superintendent to re-register the stand in the names of herself and the late Samuel Hlukanisa Masoka. This is in effect a counter-claim.

An alternative plea was filed with leave of the Court. In it appellant pleads the protection of the Rents Act, but as nothing turns on this point I need not refer to it any further.

At the commencement of the trial appellant's attorney requested the presiding officer to recuse himself because of the defence that his declaration and certificate of 17th June, 1948, is invalid. The application was refused.

During the trial appellant's attorney applied to put in the record of the estate inquiry. This also was refused.

The Native Commissioner, at the close of the case, entered judgment for plaintiff (respondent) as prayed with costs, and this judgment is attacked on appeal on the following grounds:—

1. That the judgment is against the weight of evidence.
2. That the Native Commissioner erred by not recusing himself on the application of defendant's attorney, having regard to the fact that the Native Commissioner's Declaration dated 17th June, 1948, was being challenged and formed the subject of portion of the defendant's plea.
3. That the Native Commissioner erred in refusing to allow the record of the enquiry to be put in, which said record formed a material part of the defence to the action.
4. That the order contained in the Certificate of Appointment declaring plaintiff heiress to the Stand No. 893 and directing that such stand be registered in her name was *ultra vires*.

It was pointed out in Mkwali *v.* Mkwali [1943 N.A.C. (C. & O.) 64] and in Lusiti *v.* Goniwe [1947 N.A.C. (C. & O.) 121] that the land in a municipal location is owned by the Municipality concerned and consequently buildings erected thereon also belong to the Municipality, that the legal position of the site permit holder *vis á vis* the Municipality is that of lessee and lessor, and that as lessee the site permit holder can acquire ownership of the immovable improvements erected or purchased by him by breaking down the structures and removing the materials from the site, but that this right must be exercised during the currency of the lease.

It is not disputed that respondent is the site permit holder at present. She is therefore entitled to possession. On the face of it, therefore, appellant is in the position of a trespasser and cannot object to an order of ejectment. But as there are allegations that the proceedings in the Court below were irregular this Court must examine these allegations.

It appears from the papers before us that an estate enquiry was held by the Public Prosecutor of the Magistrate's Court to determine the person or persons entitled to succeed to the estate of the late Samuel Masoka who was the registered occupier of the stand. The Public Prosecutor is not a Native Commissioner but is as stated by the Native Commissioner "clerk in charge of native estates, etc.". He had therefore no jurisdiction to hold the enquiry. This duty devolves in terms of section 23 (4) of Act No. 38 of 1927 upon the Native Commissioner as is defined in the Act. Any decision given by the Public Prosecutor is therefore void *ab initio* and as ineffective as a judgment in a civil or criminal matter given by a person who has no judicial powers. It follows therefore that any order or declaration made in pursuance of such decision is also void. The Superintendent has thus acted upon an invalid document, but for which he would not have registered the stand in respondent's name.

Now although one of appellant's main defences is that the certificate directing the Location Superintendent to register the stand in the name of respondent, is invalid, I do not think that the Native Commissioner was wrong in refusing to recuse himself, nor was he wrong in refusing to admit the record of the estate enquiry. He may well take up the position: "I admit the Public Prosecutor had no jurisdiction to hold the enquiry. I admit that, in the circumstances, my declaration that respondent is the heir is irregular. I further admit that I have no authority under the municipal regulations to direct the Superintendent to register the stand in respondent's name. But as the Superintendent has acted upon my certificate I cannot now cancel it, nor have I jurisdiction to direct the Superintendent

to register the stand in your (appellant's) name. Your only remedy is to sue the Municipality in a Court of competent jurisdiction." If this were the reasoning of the Native Commissioner—and it seems that it is—then the admission of the record of the estate enquiry would not have carried the case any further.

This virtually disposes of the whole appeal because even if appellant is the heir of Samuel or even if she purchased the stand, the Native Commissioner would be powerless to assist her because the Superintendent or his principals are not subject to the jurisdiction of the Native Commissioner's Court.

We desire however to point out that there can be no doubt that respondent, by virtue of her marriage in community of property to Samuel, is his heir *ab intestato*. [See section 2 (*e*) (i) of Government Notice No. 1664 of 1929 read with Act No. 13 of 1934.]

As the Native Commissioner has no power to order the Superintendent to transfer the site to appellant, it is unnecessary to express any opinion on her evidence that she purchased the stand with her own earnings.

The appeal is dismissed with costs.

It should be noted that the Native Commissioner's jurisdiction to hold an enquiry is confined to estates which devolve according to Native Law and Custom [section 23 (4) of Act No. 38 of 1927].

For Appellant: Mr. Kelly, Lady Frere.

For Respondent: Mr. Gillett, Kingwilliamstown.

CASE No. 55.

SKOKI MAVITYO AND ANO. *v.* TOBILE KELEKU.

KINGWILLIAMSTOWN: 11th March, 1949. Before J. W. Sleigh, Esq., President, Pike and Ranwell, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Seduction and pregnancy—Damages—Practice and Procedure—Judgment given in absence of defendant can be rescinded on application—Omission of words "by default" not irregular—Defendant should apply for rescission before appealing—False denial material to issue may suffice as corroboration of woman's story.

Appeal from the Court of the Native Commissioner, Lady Frere.

Sleigh (President) delivering the judgment of the Court:

This is an appeal against a judgment for plaintiff as prayed with costs of suit in an action in which plaintiff claims from defendants jointly and severally, the one paying the other to be absolved, five head of cattle as damages for the seduction and pregnancy of his daughter, Nomtandazo. First defendant is alleged to have caused the pregnancy of the girl and second defendant is sued in his capacity as kraal head.

It appears from the record that the summons was duly served by plaintiff himself, as is provided in section 25 (3) (*a*) of Government Notice No. 2253 of 1928, upon first defendant only at the kraal of second defendant, and that the latter was not present or represented in the Court below.

The grounds of appeal are (1) that the judgment is against the weight of evidence and the probabilities, and (2) that the summons was not served upon second defendant who was thus not present or represented at the trial.

In regard to the second ground of appeal the Assistant Native Commissioner says in his reasons that it was not his intention to give judgment against second defendant, but that judgment should have been entered against him by default. He suggests that this Court should now amend the judgment. The rules do not provide for default judgment as is understood in Magistrates' Courts. Section 26 (*b*) of the Native Commissioners' Court Rules provides that if the defendant is in default and the Court is satisfied that the summons was duly served on him, it may enter judgment for the plaintiff consistent with such evidence as may be adduced. The judgment as it stands is therefore in order and is effective against

second defendant whether the Native Commissioner intended it to be so or not. This Court cannot, in the absence of an irregularity in the proceedings, set the judgment aside in so far as it affects second defendant merely because it was entered in his absence. His remedy is to apply in the Court below for rescission in terms of rule 30 (1). That Court will then have to go into the questions whether the service of the summons was defective, whether the default was wilfully or reasonably occasioned and whether second defendant has a good defence on the merits of the case.

I turn now to the merits of the case. Nomtandazo says that she has known first defendant all her life. They first became lovers in 1942 and they *metshaed* until Friday, 2nd April, 1948, when he had full intercourse with her for the first time. On this occasion her cousin, Lydia, brought her a note (Exhibit "A") from first defendant in which he advised her that he would visit her that night. He did so and seduced her in her hut and as a result she became pregnant. She goes on to say that on the morning of Monday, 7th June, 1948, Lydia brought her another note from first defendant (Exhibit "B"). In it he writes (translation) "I want to see you at the shop there is something I am going to tell you on Thursday of the week." She says that he passed her kraal and called her, that they walked together towards some *dongas* where he told her that he would visit her that night which he did and that they had full connection on the veld.

Lydia corroborates the girl's evidence in regard to the notes and she says that on a Sunday evening some time after she had delivered Exhibit "B" first defendant came to her kraal and asked her where Nomtandazo was. On being informed that she had been to the kraal that day he said that he was going to visit her. I shall refer again to this event presently.

Malangeni and Golding were the messengers who reported the pregnancy to defendants. The former says, that when first defendant denied the charge and stated that he had rejected the girl in June, 1947, he reminded him that he had seen him with the girl at the *dongas* on 7th June, 1948, and that first defendant then admitted that he had spoken to Nomtandazo on this date but denied that he had had intercourse with her.

Golding says that when the girl was asked on what occasion she had been made pregnant she stated that it was on a Tuesday in April, 1948, that on this day she was returning from Lady Frere when first defendant met her in the bus and arranged to meet her that night, that he did visit her and had intercourse with her. Golding further states that Nomtandazo when questioned about correspondence between first defendant and herself had said there were no letters.

After Lydia and Golding had given evidence, Nomtandazo was recalled. She then stated that first defendant also had intercourse with her on Sunday, 27th June, 1948, when he arrived unexpectedly at her hut, and also on the day she returned from Lady Frere, namely, the Tuesday after 2nd April, 1948. It is surprising that she did not give this evidence in the first instance seeing that according to her evidence he had full intercourse with her only on the four occasions.

Nomtandazo says that Golding is mistaken when he says that there was no correspondence, but the fact remains that Golding is her witness and his evidence in this respect is supported by first defendant. If she had told the meeting, as she says she did, that first defendant wrote to her and that she wrote to him, Golding would not say that they both admitted that there were no letters. The handwriting in Exhibits "A" and "B" has not been identified as that of first defendant, and if there were no letters at the time the pregnancy was reported it follows that the notes (Exhibits "A" and "B") were fabricated for the purpose of the trial, and this discredits the whole of plaintiff's case.

The defence is a denial and an alibi. First defendant says that he suspected Nomtandazo with carrying on with one Mjadu and that he broke with her in June, 1947. His evidence is not convincing. We disbelieve his denial that he spoke to Nomtandazo at the *dongas* on 7th June, 1948. But a suspicion of intimacy cannot be inferred from the fact that he met her openly, especially as they have known each other since childhood. A false denial on a matter material to the issue together with other circumstances may suffice as corroboration of the woman's story (Poggenpoel *v.* Morris N.O., 1938 C.P.D. 90), but it may well be that first defendant feared that an admission might prejudice his case (see Kleinwort *v.* Kleinwort, 1927 A.D. 123).

First defendant further states that he was working for a farmer in Dordrecht from the second week in March, 1948, to 1st May. He called witnesses to support him, and they all say that first defendant did not visit his home during that period. The Native Commissioner doubts whether he was in Dordrecht district at all and says that, even if he were, he was working only about 10 miles from his home and could easily have come home. There can be no doubt that he did work in Dordrecht during March and April, 1948. Plaintiff's own witness Golding says so, and if he did visit his home it is improbable that he would have done so on weekdays, namely, on the Friday morning when he is alleged to have given the note to Lydia and the Tuesday when he is alleged to have met Nomtandazo in the bus.

We are not satisfied that first defendant did write the notes nor that he gave them to Lydia for delivery to Nomtandazo. If this evidence is excluded there is no corroboration of Nomtandazo's evidence that first defendant was intimate with her at the time she conceived. The evidence that he was seen speaking to her on 7th June, 1948, does not afford that corroboration which is required by law, and in view of the unsatisfactory evidence in regard to the notes the appeal must succeed.

The appeal is allowed with costs and the judgment of the Court below is altered to one of absolution from the instance with costs.

For Appellant: Mr. Stanford, Kingwilliamstown.

For Respondent: Mr. Kelly, Lady Frere.

CASE No. 56.

HERREN VELENGCENI *v.* **JOHN NGCANGCA, No. 121.**
RHODES LEVE *v.* **JOHN NGCANGCA, No. 122.**
ADAM MATI *v.* **JOHN NGCANGCA, No. 123.**

KINGWILLIAMSTOWN: 16th March, 1949. Before J. W. Sleigh, Esq., President, Pike and Ranwell, Members of the Court (Southern Division).

Native Appeal Case—Rents Act—Lessor may terminate monthly tenancy by notice even if rent paid regularly on due date—Notice must contain reason for requiring lessee to vacate—Ejectment order—Lessees protection not affected by late payment during currency of contractual lease—Renewal of lease after termination by notice—Fresh notice required before ejectment can be sought—Practice and Procedure—Native Commissioner not entitled to go outside pleadings—Summons issued time for payment expired premature.

Appeal from the Court of the Native Commissioner, Port Elizabeth.

Sleigh (President) delivering the judgment of the Court:

The particulars of claims, pleas, evidence, judgments and grounds of appeal in these cases are the same except that the monthly rental payable by the first two appellants is 15s. 6d. whereas that payable by Adam is 31s. For the purpose of the trial these cases were treated as one, and since the decision in one of them will also dispose of the appeals in the others I shall in my judgment deal only with Case No. 123.

According to the particulars of claim, respondent is the lessor and appellant the lessee of two rooms being part and parcel of certain premises situate at 19 Thoroughgood Street, Korsten. The tenancy is on a monthly basis and the rental is 31s. per month payable in advance. On 30th June, 1948, the rent for the months of April, May and June being in arrear, respondent gave appellant notice to vacate the rooms on 31st July, on the ground that he was in arrear with his rent. Appellant did not vacate the premises and on 5th August a summons was issued for his ejectment.

Appellant in his plea admits that on 30th June, 1948, he was in arrear with his rent for the months stated, but avers that the rent was tendered on due dates but was refused, and that on the 30th June the rent was again tendered. He pleads specially that in the circumstances respondent was not entitled to give him notice to vacate, and that in any event he was protected by he Rents Act.

The Assistant Native Commissioner found that appellant had become a statutory tenant on 1st April, 1948, by virtue of a notice given on 23rd February, 1948, and that he had forfeited the protection of the Rents Act since, on his own admission, the rents for April, May and June were not paid within seven days of the due dates. The Native Commissioner granted the order and the matter now comes on appeal to this Court.

Where a dwelling is leased for a specific period and the contract of lease contains a forfeiture clause, the lessor may on breach of a term of the contract cancel the lease by notice. Where the lease is on a monthly basis the lessor may likewise terminate the lease if, e.g., the lessee, in breach of his expressed or implied agreement, fails to pay the rent on the due dates, provided, of course, that he has not led the lessee to believe that he would accept the rent late. [Garlick, Ltd., *v.* Phillips, 1949 (1) S.A.L.R. 121.] But the important point is that since the lease is from month to month the lessor may terminate the lease by notice even if the rent had been paid regularly on the due date [Gamsu *v.* Khan, 1947 (1) S.A.L.R. at page 618]. There is therefore no substance in the defence that respondent was not entitled to give notice to vacate because the arrear rent in full was tendered on 30th June, 1948.

The notice to vacate must contain the reason for requiring the lessee to vacate the dwelling [section 15 (1) (*a*) of Act No. 33 of 1942]. When the lease has been so terminated or by effluxion of time the lessee becomes a statutory tenant and, subject to certain exceptions, enjoys the protection of section 14 (2) of the Rents Act.

There has been some difference of opinion as to the correct meaning of the words "continues to pay" appearing in section 14 (2). In Subersky *v.* Cassim (1945 C.P.D. 273) it was held that a lessee was entitled to the protection afforded by this section only if he had paid before the termination of the lease and continued top pay thereafter, the rent within seven days of the due date. But this view was dissented from in Gerber *v.* Van Eyssen [1947 (1) S.A.L.R. at page 708], Myers *v.* Shraga [1947 (2) S.A.L.R. at page 261], and Press Supplies, Ltd., *v.* Potham [1947 (2) S.A.L.R. 428], and it would probably not now be followed in the Cape Provincial Division [see Gross v. Unity Café, 1948 (3) S.A.L.R. at page 1172]. The weight of authorities, therefore, supports the view that the protection which a statutory tenant enjoys under the provisions of secion 14 (2) of the Rents Act is not affected by his default in the payment of rent during the currency of his contractual tenancy.

It appears from the papers before us that a summons for ejectment was issued against one of the present appellants on the 17th November, 1947. A plea was delivered on the 27th November in which it was alleged that by agreement between the parties plaintiff (respondent in present case) had to call or send for the rent at defendant's place of residence. The summons was withdrawn on the same date. Thereafter notices to vacate the rooms were served on the appellant on 27th January and 23rd February, 1948, but no steps were taken to eject him, apparently, because the rent had been paid to respondent's previous attorney who, respondent alleged, had no authority to receive the rent. In any case, it is clear that up to the 16th June, 1948, respondent took up the attitude that the lease had been cancelled. Respondent's attorney says in his evidence that on that date "I advised defendant's attorney that plaintiff was prepared to accept defendant as tenants and requested payment of rent. Between 16th and 30th June I telephoned defendant's attorney twice requesting payment of rent and thereafter on 30.6.48 on instructions from plaintiff I phoned defendant's attorney and advised him that as rent had not been paid notice had been given to tenants to vacate." It is thus clear that there was an unequivocal offer to recognise appellant as a tenant, and as the latter was in occupation at the time and tendered the rent the contractual lease which had expired by virtue of the notice of the 23rd February, 1948, was renewed, and consequently it is necessary to terminate this new lease by notice before an ejectment can be sought. Such notice was given on 30th June terminating the lease on 31st July, 1948. The rent for April, May and June was paid on the 30th June. The fact that the rent for July may not have been paid within seven days of the due date, does not entitle respondent to eject appellant on this ground (Gerber *v.* Van Eyssen *supra*).

Novation and waiver are defences which must be pleaded, but there is no allegation in the summons that respondent was relying on the notice dated 23rd

February, 1948, as putting an end to the contractual lease. On the contrary it is clear from the summons and the evidence that he relies on the notice served on 30th June, 1948, as terminating the lease. In the absence of any application to amend the summons the Native Commissioner was not entitled to go outside the pleadings in determining the date when the contractual lease expired.

As a result of the notice dated the 30th June, 1948, appellant became a statutory tenant on 1st August and was protected against ejectment by section 14 (2) of the Rents Act, provided he paid the August rent on or before the 8th of that month. The summons having been issued on the 5th of that month was therefore premature and respondent is not entitled on the summons as it stands to an order of ejectment.

The appeal is allowed with costs and the judgment of the Court below is altered to one for defendant with costs.

For Appellants: Mr. Stanford, Kingwilliamstown.

For Respondent: Mr. Gillett, Kingwilliamstown.

CASE No. 57.

ROBERT MAQUBELA *v.* **JACKSON GOLA.**

KINGWILLIAMSTOWN: 16th March, 1949. Before J. W. Sleigh, Esq., President, Pike and Ranwell, Members of the Court (Southern Division).

Native Appeal Case—Rents Act—Ejectment order—Statutory tenant—Meaning of letter—Tacit renewal of lease—Onus on tenant to satisfy Court as to owner's intention to waive right or his willingness to grant or continue tenancy—Waiver of right to eject for future defaults cannot be inferred from expressed waiver of right in respect of existing default—Demand of arrear rent from statutory tenant does not constitute renewal of lease—Practice and Procedure—Application for leave to appeal to the Appellate Division refused—Grounds (1) *that amount involved is of a trivial nature,* (2) *matter of no real importance to parties,* (3) *no questions of status or reputation involved.*

Appeal from the Court of the Native Commissioner, Port Elizabeth.

Sleigh (President) delivering the judgment of the Court:

Plaintiff is the landlord of defendant who is the tenant of a certain room in premises situate at 15 Newell Street, Korsten. The monthly rent of 5s. which was determined by the Port Elizabeth Rent Board, is payable in advance. Plaintiff alleges that on 17th February, 1948, he gave defendant "due and legal" notice to vacate the room at the end of March, 1948, and that at the date of issue of summons (6th October, 1948) defendant was in arrear with the rent since the end of June, 1948. He claims against defendant (1) an order of ejectment from the room, and (2) £1 as damages for loss of rental of 5s. per month for the months of June, July, August and September, 1948.

In his plea defendant admits that he is in arrear with his rent but he avers that it was for the months of July, August, September and October. He paid £1 into Court. He admits (during the trial) that he had received the notice dated 17th February, 1948, but pleads "that if such notice constituted due and legal notice to vacate, the same has been waived and the tenancy novated".

The Assistant Native Commissioner found in effect that the notice of 17th February, 1948, had been withdrawn and gave judgment for defendant with costs, and authorised plaintiff to uplift the amount paid into Court. Against this judgment plaintiff has appealed on the following grounds:—

(1) That the judgment is against the weight of evidence and is not supported thereby.

(2) That the Magistrate erred in holding that the letter of the 9th April, 1948, cancelled the notice of the 17th February, 1948, and re-instated the common law tenancy and that the defendant was not a statutory tenant as from the 31st March, 1948. That as a fact in law defendant was as from the 31st March, 1948, a statutory tenant and had breached his obligation as such. Plaintiff was therefore entitled in law to claim his ejectment.

It is not disputed that on 9th April, 1948, defendant was in arrear with the rent for April, 1948, and that he had then lost the protection of section 14 (2) of Act No. 33 of 1942. On that date plaintiff's attorney wrote to defendant's attorneys as follows (Exhibit "B"):—

> "With reference to the above matter I have to inform you that my client has decided not to proceed against the above tenants in terms of the notice of the 17th February, 1948.
>
> "He has authorised me to receive the rent from you and I will be pleased if you will forward same at your earliest convenience. A further two months' rent has accrued since the notices were sent.
>
> "In fairness to your clients will you kindly inform them that Maqubela has received orders to rebuild the premises and they will in due course be receiving further notices to vacate."

The Native Commissioner says in his reasons that this letter is ambiguous, that it must therefore be construed against the writer thereof, and that, so construed, it amounts to a withdrawal of the notice to vacate dated 17th February, 1948, and a re-instatement of the common law tenancy existing prior to its termination.

It seems to me that the Native Commissioner went wrong here in an otherwise able judgment. The rule that in a case of ambiguity, a stipulation must be construed against the party who has stipulated for anything and in favour of the release of the party who has contracted the obligation, applies to the interpretation of contracts (see *Scoble on Evidence,* 2nd Ed., page 352).

Exhibit "B" does not stipulate for anything nor does it seek to place any contractual obligation upon defendant. The date of the letter is significant. It was the date of accrual of plaintiff's right to eject defendant. The statement that he had decided not to proceed against defendant can only mean that he did not intend to eject him by reason of his default to pay the April rent within seven days of due date. This was a clear and expressed waiver of his right in respect of this default, but it cannot be inferred that plaintiff also intended to waive his right to eject in respect of future defaults. A statutory tenant is in the position of a protected trespasser. If he alleged that a right has been waived or an expired lease has been renewed by implication, the onus is on him to satisfy the Court that the facts on which he relies to establish this must be such that they admit of no doubt as to the owner's intention to waive the right or his willingness to grant or continue the tenancy. [Van der Merwe *v.* Erasmus, 1945 (1) P.H.A. 12.]

The further statement in Exhibit "B" that he had authorised his attorneys to receive the rent and the request for payment of the arrear rents do not amount to a renewal of the tenancy because even statutory tenants are required to pay rent.

The final paragraph in this letter does not assist defendant. It was obviously written as an afterthought. It may well be a hint to defendant that if he can secure other accommodation he should do so in view of the proposed rebuilding scheme. The words "in fairness to your clients" point in that direction, but even if this is not the meaning of this paragraph the onus was on defendant to show that its meaning, properly construed, constitutes a renewal of the expired lease by necessary implication, and this he has not done.

The position is then that on the date of the issue of the summons defendant had lost the protection of section 14 (2) of the Rents Act in respect of the rent for the months of July, August and September and plaintiff was consequently entitled to an order of ejectment against him.

The appeal consequently succeeds.

Pike (Member): The question to be decided is the interpretation of the letter Exhibit "B". The notice dated 17th February, 1948, terminated the lease but did not constitute a ground for ejectment [see Gamshu *v.* Khan, 1947 (1) S.A.L.R. 616]. Defendant was entitled to remain in occupation by virtue of section 14 (2) of Act No. 33 of 1942. On 9th April, 1948, rent for that month had not been paid and plaintiff was therefore entitled to issue process for ejectment. The construction to be put upon the first paragraph of the letter is, in my opinion, that the ejectment which could legally be sought at that stage would not be proceeded with. There is nothing in the wording which could indicate that a new lease was offered. It

was merely an expression of plaintiff's intention not to eject defendant then. Nor is there any suggestion that plaintiff was abandoning his right altogether, i.e., that he waived the right to eject defendant if he continued to make default in payment at a later date. The facts show that rent was timeously paid in May and June but not thereafter. Plaintiff sent no further notice to defendant but claimed ejectment. Therefore, in my opinion, the meaning of the first paragraph of the letter was a waiver only of the right to eject at that stage. I can find no justification for the view that, by implication, the plaintiff withdrew the notice terminating the lease.

Plaintiff, having waived his right to eject on 9th April, defendant could remain in occupation provided he made subsequent payments within seven days of due dates. Bearing this in mind, I interpret the meaning of the final paragraph of the letter as being no more than a warning that the provisions of section 14 (2) (*d*) of Act No. 33 of 1942 might have to be invoked. I agree that the appeal must succeed.

Ranwell (Member): I concur.

Sleigh (President): The appeal is allowed with costs and the judgment of the Court below is altered to one for plaintiff as prayed with costs.

For Appellant: Adv. E. N. Egan, instructed by J. H. Spilkin, Port Elizabeth.

For Respondent: Mr. Stanford, Kingwilliamstown.

Postea, March 24th.

Application for leave to appeal to the Appellate Division.

Sleigh (President) delivering the judgment of the Court:

On 16th March this Court altered the judgment in this case from one for defendant with costs to one for plaintiff with costs. Application is now made by defendant in terms of section 18 (1) of the Native Administration Act (No. 38 of 1927) for leave to appeal to the Appellate Division. The points he desires to take on appeal are—

(*a*) that the above Honourable Court erred in holding that the appellant's right to sue for ejectment based on the notice of the 17th February, 1948, only accrued on the 9th April, 1948;

(*b*) that the said Honourable Court erred in holding that the letter of the 9th April, 1948, meant that appellant did not intend to eject the respondent by reason of his default to pay the April rent within seven days of due date;

(*c*) that the true construction of the said letter is that appellant had decided not to proceed to enforce his rights arising out of the said notice dated 17th February, 1948, at any point in time, and that that interpretation is the only reasonable and grammatical interpretation of the said letter;

(*d*) by reason of the aforegoing, the above Honourable Court erred in not holding that the respondent was no longer a statutory tenant, and that the said notice to vacate dated the 17th February, 1948, was waived, and the tenancy novated;

(*e*) that the said Honourable Court should have held that the respondent has acted on the letter of the 9th April, 1948, and had paid to the appellant rent thereafter, and that therefore a new contract has been created between the parties novating the said statutory tenancy.

The inclination of the Court in these applications is to give an applicant the opportunity of seeking redress in a higher Court, but it is an inclination which must be resisted because the section confers a discretion on the Court to give or withhold its consent and this discretion must be exercised judicially. In exercising its discretion this Court will be guided by those considerations which weigh with the Appellate Division in similar applications. ..

The Appellate Division has on various occasions said that it is impossible and undesirable to lay down a wholly exhaustive rule as to the conditions under which leave to appeal will be granted (see African Films Trust, Ltd., *v.* Popper, 1916 A.D. at page 488). But the main considerations are that applicant must have an arguable case, that the matter in dispute is of substantial importance to the parties and that the amount involved is not trivial in comparison with the costs which may be incurred. Formerly it was the practice to grant leave to appeal even if the matter in dispute were trivial, provided important points of law or practice, or points of importance to the public were involved, but *Wessels, C.J.*, in Haine *v.* Podlashuc

and Nicolson (1933 A.D. at page 112) said: "A larger experience on the part of this Court has shown that in granting leave the Court ought not to encourage appeals where the amount in dispute is trivial merely in order to settle some disputed point of law or matter important to the public or to a particular class, for it is most undesirable that such questions should be settled at the expense of one or other litigant (Caplan *v.* Saycell, decided on 1st September, 1932). In granting leave the predominant consideration ought to be whether the matter is of substantial importance to one or both of the parties concerned. It is unfair and inadvisable to force a litigant who has obtained a decision of a superior Court in his favour to incur further expense—which often, though successful, he cannot recover from his opponent—when the original action was for some trivial amount. The mere fact that interesting questions of law may crop up in an action for a trumpery amount, which is of no real interest to the litigant, is no sound reason in itself for giving leave to appeal. If a person who has a small claim against another knows that he can be dragged to this Court and involved in great expense (and the mere typing or printing of the record involves considerable expense) simply because the claim may raise some question of public or professional interest he may prefer to forego his claim. We should avoid making litigation oppressive, and except in cases involving a matter of real importance to the parties or concerning questions of status or reputation, we should not in future readily grant leave to appeal."

I turn now to the application before the Court. The history of the case is stated in the judgment. Briefly it is as follows: Appellant (now respondent) gave notice to applicant on 17th February, 1948, terminating the lease on 31st March, 1948. On 1st April the rent which was payable in advance was in arrear for several months. On 9th April the rent for that month was also in arrear. On that date respondent's attorney wrote the letter (Exhibit B) to applicant's attorney, and the decision in the case rested upon the correct interpretation of that letter.

Now it is contended on behalf of applicant—[para. (*a*)]—that this Court erred in holding that the right to eject accrued on 9th April because this right in law accrued on the 1st April in view of the fact that on that date the rent for some previous months was in arrear. It is argued that this raises an important point of law and that it is desirable to submit it to the Appellate Division for a ruling. This point was decided in Gerber *v.* Van Eyssen [1947 (1) S.A.L.R. at p. 708] which decision has been followed in a number of other cases. But even if the point is arguable it can wait for a more appropriate occasion.

Paragraphs (*b*), (*c*), (*d*) en (*e*): I concede that the letter of the 9th April, 1948 (Exhibit B) may be capable of more than one construction. I will also concede that the right involved is of importance to the parties—to the applicant, because he will be ejected, and to respondent because he will be burdened with a tenant who has proved himself consistently unsatisfactory. The matter in dispute, however, is of a trivial nature. The monthly rent fixed by the Rent Board is only 5s. It is true, as was pointed out by *Searle, A.J.*, in Moyce *v.* Estate Taylor [1947 (2) S.A.L.R. at p. 142], that the right of occupation of a dwelling under present-day circumstances is far more valuable than any ordinary computation based on the rental value, but having regard to the definition of "reasonable rent" in Act No. 33 of 1942, the value of the room itself cannot be more than £40 and the probable costs to respondent in defending the appeal will thus exceed the value of the room. Moreover, the applicant is not entitled to much consideration. The record indicates that he has been consistently in arrear with his rent—at one period having failed to pay for nine months—and has shown by his own conduct that he did not regard the right of occupation of real value otherwise he would not have failed to secure his rights by paying regularly the small amount of 5s. per month.

Having considered the circumstances of the whole case and having regard to what was said in Haine's case (*supra*) leave to appeal must be refused with costs.

Pike and Ranwell (Members) concurred.

For Applicant: Mr. Bendelstein, Port Elizabeth.

For Respondent: Adv. E. N. Egan, instructed by J. H. Spilkin, Port Elizabeth.